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Supreme Court of the United States.

October Term, 1930.

No. 57.

Story Parchment Company

v.

The Paterson Parchment Paper Company and Kalamazoo Vegetable Parchment Company.

REPLY BRIEF IN SUPPORT OF MOTION FOR COUNSEL FEES.

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ISADORE LEVIN,
EDWARD C. PARK,
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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 57.

STORY PARCHMENT COMPANY

v.

THE PATERSON PARCHMENT PAPER COMPANY

AND

KALAMAZOO VEGETABLE PARCHMENT COMPANY.

REPLY BRIEF IN SUPPORT OF MOTION FOR COUNSEL FEES.

It is said in the brief for defendants, of the attorney's fee fixed by the District Court for services in that court:

> "The allowance was very large,—over forty per cent of the amount of damages which the jury found that the plaintiff had sustained (R. 13). No precedent appears for so very large a percentage."

We do not know what precedents defendants' counsel had in mind. All that we have found (in which the question was considered) show larger percentages.

In *W. W. Montague & Co.* v. *Lowry*, 193 U.S. 38, the verdict was $500, and the District Court made an allowance, approved in this court, of $750.

In *American Can Co.* v. *Ladoga Canning Co.*, 44 Fed. (2d) 763 (C.C.A. 7) (certiorari denied January 12, 1931), the verdict was $30,000, and the District Court made an allowance of $15,000. A further allowance was made by the Circuit Court of Appeals for services in that court.

In *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (C.C.A. 2), the verdict was $49,698.71, and the District Court made an allowance of $35,000. On appeal the verdict was reduced, by eliminating one item of damage, to $33,894.71, and the attorney's fee to $30,000.

But, of course, as the cases cited show, a reasonable attorney's fee under the statute is not to be fixed by taking any particular percentage of the amount of a verdict. And see Canons of Professional Ethics of the American Bar Association, section 12.

Judged by proper standards the fee allowed by the District Court is a modest one. We think it should have been larger. But any question as to its amount is one of fact; upon which we assume that an appellate court would not pass.

Respectfully submitted,

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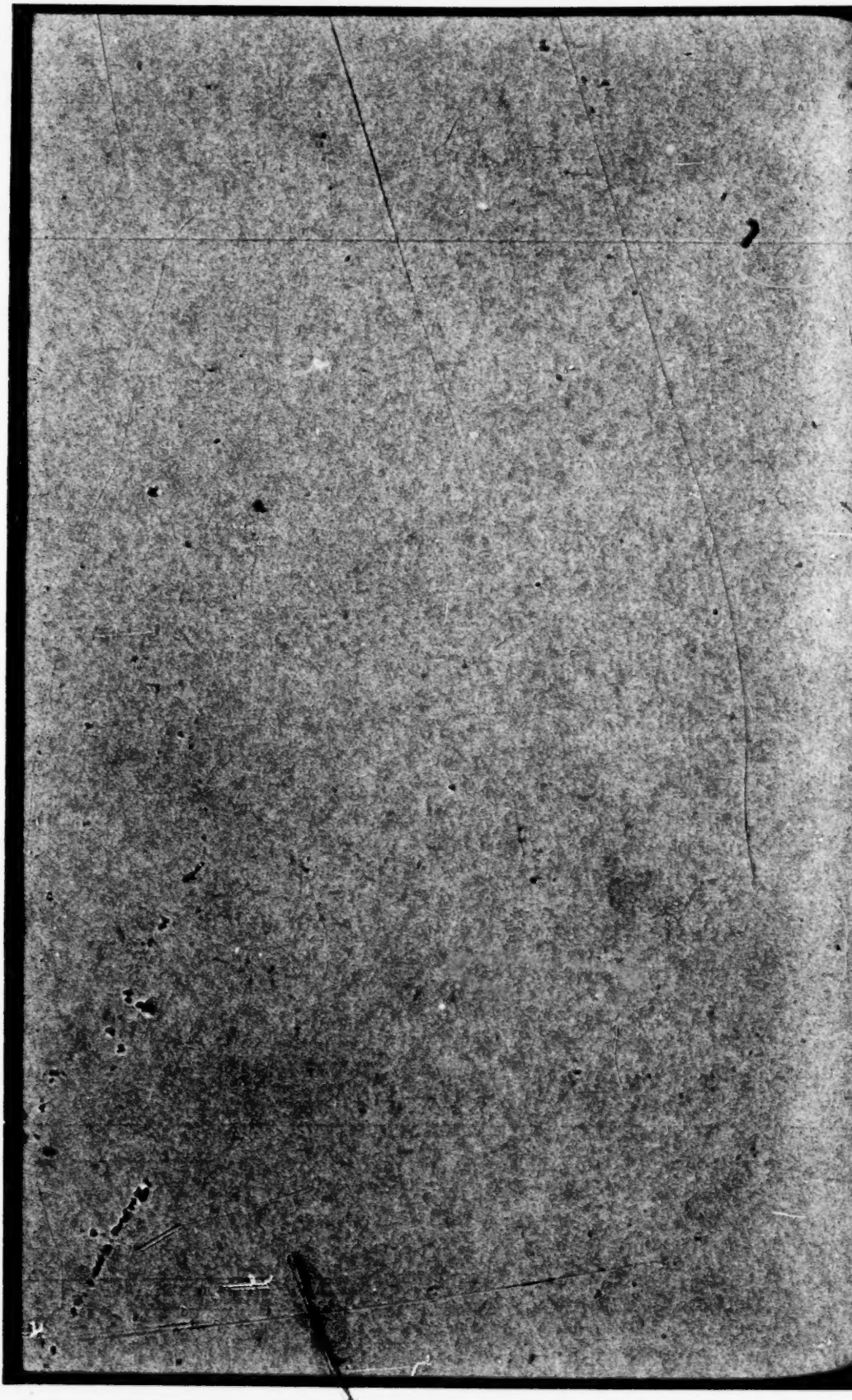

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1930.

Story Parchment Company, Petitioner, vs. The Paterson Parchment Paper Company and Kalamazoo Vegetable Parchment Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 24, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action arising under the Sherman Anti Trust Act to recover damages resulting from an alleged conspiracy between respondents and West Carrollton Parchment Company, not joined for lack of jurisdiction, to monopolize interstate trade and commerce in vegetable parchment, exclude the petitioner therefrom, and destroy its business in such trade and commerce. A jury returned a verdict for petitioner in the sum of $65,000, but in the alternative for the respondents "if, as a matter of law, the plaintiff is not entitled to a verdict." The trial court approved the verdict and rendered judgment for treble the amount of the damages in accordance with § 7 of the act. On appeal to the circuit court of appeals, the judgment was vacated and the case remanded to the trial court with directions to enter judgment for respondents upon the ground that petitioner had not sustained the burden of proving that it had suffered recoverable damages. 37 F. (2d) 537.

Respondents seek to sustain this judgment upon that ground and also upon the additional ground, which the lower court found against them, that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross-petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do. *Langnes* v. *Green*, 282 U. S. —, decided this day.

The point, however, is readily disposed of. There is evidence in the record to the effect that the three companies named, prior to

the time petitioner entered the field, had maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. There is also evidence, sufficient to justify the action of the district court in submitting the issue to the jury, that after petitioner began business the three companies combined and conspired to continue this monopoly in violation of § 2 of the Sherman Anti Trust Act, c. 647, 26 Stat. 209. The verdict of the jury and the judgment thereon of the district court have the effect of a finding in favor of petitioner upon that issue; and to that extent the verdict and judgment were sustained by the court below. There is enough evidence in the record to preclude an interference on our part with these concurrent findings. That the petitioner was injured in its business and property as a result of this unlawful combination we think also finds sufficient support in the evidence. Questions in respect of the liability of the wrongdoers to respond in damages alone remain to be considered.

The trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents; and (2) the extent to which the value of petitioner's property had been diminished as the result of such acts.

The view of the court of appeals that no recovery could be had in respect of the first item apparently rests upon its conclusions that there was no basis for a reasonable inference that prices in excess of those actually realized would have prevailed if there had been no combination; and that, in any event, there was no damage which could be measured and expressed in figures not based on speculation and conjecture.

There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. It does not necessarily follow, of course, that these

higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated. The trial court fairly instructed the jury in substance that if they were satisfied that the old prices were reasonable and that they would not have changed by reason of any economic condition, but would have been maintained except for the unlawful acts of the respondents, the jury might consider as an element of damages the difference between the prices actually received and what would have been received but for the unlawful conspiracy.

Upon a consideration of the evidence we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.

Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor* v. *Bradley*, 4 Abbott (N. Y. Ct. of App.) 363, 366-367:

"It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying